



and PwC's citation, on a related point, to *In re Owens Corning*, No. 04-4080, \_\_\_ F.3d \_\_\_, 2005 WL 1939796 (3d Cir. Aug. 15, 2005), decided after the Committee's summary judgment opposition brief was filed.

3. PwC's opening and reply brief in support of its summary judgment motion each exceeded the page limits set forth in the Case Management Order. PwC's initial memorandum in support was 60 pages long, ten pages longer than the 50 pages allowed by the Case Management Order. Although the Committee's opposition brief complied with the Case Management Order's 50-page limit, PwC filed a reply brief that exceeded by four pages the Case Management Order's 25-page limit for reply briefs. The Committee did not oppose the filing of either of these longer-than-rule briefs.

4. The Committee's sur-reply seeks only to respond to two arguments asserted in PwC's reply brief but not asserted in its opening brief -- at least one of which was available and could have been asserted in that opening brief.

5. In its reply brief, PwC did not set out completely the procedural history and the limited nature of the holding of the Third Circuit in *Cendant*. *Cendant* did not "reject" *Phar-Mor*. It did not mention *Phar-Mor*. *Cendant* affirmed an order approving a class settlement. PwC also did not mention that Judge Ziegler, in this case, had already expressed this Court's disagreement with PwC's interpretation of *Cendant*. See January 28, 2002, Order at 9-10.

6. PwC also argued for the first time that it would be unconstitutional to apply to PwC the order of the Bankruptcy Court adopting the AHERF reorganization plan. In its opening brief, PwC argued that its liability should not be affected by the order approving the plan. On reply, PwC made its new constitutional argument. In connection with its argument concerning the impact of the plan, PwC also cites the recently decided *Owens Corning* opinion. This

decision was issued after the Committee filed its opposition brief. PwC cites the opinion but does not address the key lesson of the case: that the effect of substantive consolidation is to treat different debtors as a single entity.

WHEREFORE, the Committee respectfully requests that the Court grant it leave to file a sur-reply in opposition to PwC's motion for summary judgment.

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Respectfully submitted,

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